



Consumer Electronics Association
1919 South Eads Street
Arlington, VA
22202 USA
(866) 858-1555 toll free
(703) 907-7600 main
(703) 907-7601 fax
www.CE.org

Via Electronic Filing

July 20, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

*Re: Notice of Ex Parte Presentation – CG Docket No. 10-213, WT Docket No. 96-198,
CG Docket No. 10-145*

Dear Ms. Dortch:

This is to notify you that on July 18, 2011, Julie Kearney, Vice President, Regulatory Affairs, Consumer Electronics Association (“CEA”), accompanied by Emmett O’Keefe, Amazon.com, Inc., Jim Morgan, Sony Electronics, Inc., John Godfrey, Samsung Information Systems America, Inc., Paula Boyd, Microsoft Corp., and outside counsel William Maher and Mark Walker of Wilkinson Barker Knauer, LLP, met with Rick Kaplan, Bureau Chief, Wireless Telecommunications Bureau.

Consistent with its comments and reply comments in the above-captioned proceedings,¹ CEA urged implementation of the Advanced Communications Service (“ACS”) provisions of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) in a manner that balances the increased accessibility of ACS with manufacturers’ and service providers’ continued ability to innovate. To help guide the meeting, CEA provided Mr. Kaplan with (i) the attached agenda that summarizes the items discussed and provides cross-references to the relevant portions of CEA’s comments and reply comments and (ii) the attached chart that compares the ACS provisions of the legislation originally introduced in the House of Representatives to the provisions enacted in the CVAA. The comparison chart demonstrates Congress’s intent to narrow the scope of the statute and to achieve a greater balance between the

¹ See Comments of CEA, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198 (filed Apr. 25, 2011); Reply Comments of CEA, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198 (filed May 23, 2011).

increased accessibility of ACS and service providers' and manufacturers' continued ability to innovate.

In addition, the following items were discussed during the meeting:

- **Interoperable Video Conferencing Service:** CEA discussed the definition of “Interoperable Video Conferencing Service.”² CEA emphasized that Congress’s inclusion of the term “interoperable” narrowed the scope of the video conferencing services covered by the ACS provisions of the CVAA. In addition, CEA explained that the video relay service (“VRS”) approach to interoperability is an inappropriate model for commercial video conferencing services.
- **Scope of the ACS Definition and Waivers:** CEA urged that the Commission exclude from its final rules products or services that only include incidental ACS. Limiting the scope of the ACS definition would help minimize the burden on industry and the Commission associated with processing waiver requests.
- **Phase-In:** CEA emphasized the need for at least a 24-month phase-in period to provide industry with the necessary time to comply with the Commission’s final rules. A 24-month phase-in is consistent with the one-year implementation period for the recordkeeping required by new Section 717 of the Communications Act (the “Act”), added by the CVAA.³ With a 24-month phase-in for compliance with the rules, much of the design and development of compliant products will likely occur around the time that Section 717 requires covered entities to keep records.
- **Recordkeeping:** CEA urged that the Commission only require that covered entities maintain records for the three categories set forth in Section 717. CEA noted that a covered entity may retain additional records related to accessibility, but emphasized that any additional recordkeeping requirements beyond those set forth in the statute would unnecessarily burden covered entities and inhibit their operational flexibility.
- **Informal Complaint Process:** CEA emphasized the need for the Commission to narrow the proposed informal complaint process in order to focus on resolving consumer complaints. Specifically, CEA requested that the Commission provide its staff with the discretion to close an informal complaint proceeding if the staff deems that the complaint

² *Ex Parte* Letter from Julie Kearney, CEA to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-213 & 10-145, WT Docket No. 96-198 (filed July 18, 2011) (discussing the definition of “Interoperable Video Conferencing Service”).

³ *See* 47 U.S.C. § 618(a)(5)(A) (“Beginning one year after the effective date of regulations promulgated pursuant to section 716(e), each manufacturer and provider subject to sections 255, 716, and 718 shall maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718 . . .”).

is resolved,⁴ similar to the Commission's current practice under its rules implementing Section 255 of the Act:

As a general matter, if it appears from a response to an informal complaint that the accessibility problem has been resolved, the staff shall close-out the complaint.⁵

Pursuant to Section 1.1206 of the Commission's rules,⁶ this letter is being electronically filed with your office and a copy of this submission is being provided to the meeting attendee from the Commission. Please let the undersigned know if you have any questions regarding this filing.

Respectfully submitted,

/s/ Julie M. Kearney

Julie M. Kearney
Vice President, Regulatory Affairs

Attachments

cc: Rick Kaplan

⁴ *Id.* § 618(a)(3)(B) ("The Commission shall investigate the allegations in an informal complaint and, within 180 days after the date on which such complaint was filed with the Commission, issue an order concluding the investigation, *unless such complaint is resolved before such time.*" (emphasis added)).

⁵ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6471 ¶ 136 (1999). *See also* 47 C.F.R. § 6.20(a).

⁶ 47 C.F.R. § 1.1206.

CVAA – Advanced Communications Services NPRM
(CG Docket Nos. 10-213, 10-145, WT Docket No. 96-198)
CEA *Ex Parte* Meeting Agenda

July 18, 2011

1. Introduction/Background on CEA

- a. Principal U.S. trade association for the consumer electronics and information technologies industries (Com. at 2)
- b. 2,000 member companies that cumulatively generate more than \$186 billion in annual factory sales (Com. at 2 n.4)
- c. CEA and its member companies were actively involved in the CVAA legislative process and continue to engage in regulatory and standards activities relating to accessibility (Com. at 2 & n.6)

2. CVAA Purpose and Legislative History

- a. Congress intended to balance increased accessibility of ACS with manufacturers' and service providers' continued ability to innovate (Com. at 3)
- b. Congress consciously narrowed the scope of the legislation to ensure this balance, for example:
 - i. Added Section 2(a) – limitation on liability (Com. at 3 & n.7)
 - ii. Added “interoperable” and “service” to limit the forms of video conferencing subject to the CVAA (Com. at 3 & n.8)
 - iii. Added the waiver authority (Com. at 3-4 & n.9)

3. An Initial Phase-In Period is Essential

- a. A minimum 24 month phase-in period before commencing enforcement will provide the needed time for covered entities to comply with the final rules (Com. at 39; Rep. at 3-4)
- b. Such a phase-in period also provides time to address waiver requests filed in response to the final rules (Com. at 40; Rep. at 4-5)
- c. The Commission should grandfather in products released prior to the promulgation of the final rules (Com. at 40; Rep. at 5)

4. Definitions and Scope of the Rules Should Be Interpreted Consistently With All of the Statute

- a. A product or service that only includes incidental ACS should be excluded from the scope of the CVAA; Section 716 makes clear that the accessibility obligations only apply to an “offer” of ACS (Com. at 10; Rep. at 6)
- b. No authority exists to impose an interoperability mandate; the inclusion of “interoperable” limits the scope of video conferencing services covered by the CVAA (Com at 36; Rep. at 8-9)
- c. Section 2(a)’s liability limitation should be incorporated in the Commission’s final rules to ensure that the accessibility of a third-party app is the responsibility of the third-party developer, rather than the device manufacturer or underlying service provider (Com. at 7, 34-35; Rep. at 17)

5. Exemptions/Waivers Should Be Applied Reasonably

- a. Customized equipment or services exemption should apply broadly; this exemption was expressly added by Congress (Com. at 16; Rep. at 9-10)
- b. Waiver authority was also added in the legislative process; the Commission should focus on the plain language of the statute and not favor individualized over class waivers nor limit the duration of waivers (Com. at 17-18; Rep. at 10-11)
- c. Small entities exemption should be used to minimize the burden on small business and promote the pace of technological innovation (Com. at 20-21; Rep. at 11)

6. Achievability Rules Should Reflect The CVAA’s Balanced Approach

- a. The Commission should only consider the four factors provided in the statute, giving each equal weight (Com. at 21; Rep. at 12)
- b. The four factors should be incorporated into the Performance Objectives to help ensure greater clarity for covered entities as well as the FCC
- c. Built-in solutions should not be preferred to third-party solutions (Com. at 27-28; Rep. at 14-15)
- d. Nominal cost should be determined objectively on a case-by-case basis, considering the nature of the service or product as well as its total lifetime cost (Com. at 27; Rep. at 15)
- e. The “compatibility” rules should permit flexible and economical implementation (Com. at 29-30)

7. Recordkeeping Requirements Must be Realistic

- a. Covered entities should only be required to maintain records for those categories set forth in Section 717 and not go beyond what Congress intended (Com. at 41)
- b. The Commission should provide flexibility in how covered entities implement the recordkeeping requirements (Com. at 41-42; Rep. at 19)

8. Enforcement Should Focus On Resolution of Consumer Issues

- a. Requiring a pre-filing notice will facilitate timely resolution of consumer complaints (Com. at 43-44; Rep. at 20-21)
- b. Screening complaints prior to forwarding to defendants will reduce the burden on industry and the Commission alike (Com. at 44)
- c. A 40-day answer period will provide a reasonable timeframe for a defendant to fully and accurately respond to a complaint (Com. at 45; Rep. at 21)
- d. The answer content requirements should be streamlined to focus narrowly on (i) whether the device or service is accessible and (ii) if not accessible, whether accessibility is achievable (Com. at 45-46; Rep. at 21)
- e. The foregoing is consistent with the 180-day statutory period in which a complaint must be resolved
- f. CEA submitted draft rules which we urge the Commission to adopt (Com. at App. A)

9. Mobile Internet Browsers

- a. Section 718 should be applied consistently with the flexibility requirements of Section 716 (Com. at 49; Rep. at 22-23)
- b. Section 718 does not cover data-only devices such as laptops and tablets (Com. at 49)

**Comparison of CVAA Advanced Communications Services Provisions:
H.R. 3101 (as introduced) to Pub. L. 111-260 (as enacted)
Consumer Electronics Association
CG Docket Nos. 10-213, 10-145; WT Docket No. 96-168
July 18, 2011**

| Subject¹ | H.R. 3101 (as introduced) | Pub. L. 111-260 (as enacted) |
|---|---|---|
| Sections Applicable to Titles I & II of the CVAA | | |
| Limitation on Liability | None | Added (CVAA Sec. 2) |
| Proprietary Technology | None | Added (CVAA Sec. 3) |
| Definitions added to Section 3 of the Communications Act | | |
| Advanced Communications Services | “The term ‘advanced communications’ means . . . (C) electronic messaging; and (D) video conferencing.” | “The term ‘advanced communications <i>services</i> ’ means . . . (C) electronic messaging <i>service</i> ; and (D) <i>interoperable</i> video conferencing <i>service</i> .” ² |
| Electronic Messaging Service | “The term ‘electronic messaging’ means a service that provides non-voice messages in text form between persons over communications networks.” | “The term ‘electronic messaging <i>service</i> ’ means a service that provides <i>real-time or near real-time</i> non-voice messages in text form between individuals over communications networks.” |
| Interoperable Video Conferencing Service | “The term ‘video conferencing’ means a service that provides real-time video communications, including audio, to enable users to share information of the user’s choosing.” | “The term ‘ <i>interoperable</i> video conferencing <i>service</i> ’ means a service that provides real-time video communications, including audio, to enable users to share information of the user’s choosing.” |
| Internet Access Equipment | “. . . means equipment that is used to combine computer processing, information provision and computer interactivity with data transport . . .” | None |
| Internet Access Service | “. . . means service that combines computer processing, information provision, and computer interactivity with data transport . . .” | None |
| Section 716 of the Communications Act | | |
| Applicability to Manufacturers | “. . . equipment and software that such manufacturer <i>designs, develops, and fabricates</i> . . .” | “. . . equipment and software that such manufacturer <i>offers for sale or otherwise distributes in interstate commerce</i> . . .” (Sec. 716(a)(1)) |
| Undue Burden and Achievability Standards | “. . . unless the requirement of this subsection would result in an <i>undue burden</i> .” | “. . . unless the requirements of this subsection are <i>not achievable</i> .” (Sec. 716(a)(1), (b)(1)) |

¹ This chart focuses on the advanced communications services (“ACS”) provisions of H.R. 3101 (as introduced) and Pub. L. 111-260 (as enacted) most directly applicable to manufacturers and service providers, rather than a line-by-comparison of the legislation.

² Emphasis added throughout.

**Comparison of CVAA Advanced Communications Services Provisions:
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Consumer Electronics Association
CG Docket Nos. 10-213, 10-145; WT Docket No. 96-168
July 18, 2011**

| Subject¹ | H.R. 3101 (as introduced) | Pub. L. 111-260 (as enacted) |
|--|---|---|
| Industry Flexibility | None | Added for manufacturers and service providers (Sec. 716(a)(2), (b)(2)) |
| Applicability to Service Providers | “ . . . services offered by such provider. . . ” | “ . . . services offered by such provider <i>in or affecting interstate commerce</i> . . . ” (Sec. 716(b)(1)) |
| Undue Burden and Achievability Definitions | <p>“ . . . ‘undue burden’ means significant difficulty or expense.”</p> <p>Factors:</p> <ol style="list-style-type: none"> 1. “the nature and cost of the steps required to develop and manufacture the product in question;” 2. “the impact on the operation of the manufacturer or provider;” 3. “the <i>financial resources of the manufacturer or provider</i>;” 4. “the type of operations of the manufacturer or provider.” | <p>“ . . . ‘achievable’ means with reasonable effort or expense, as determined by the Commission.”</p> <p>Factors:</p> <ol style="list-style-type: none"> 1. “The nature and cost of the steps needed <i>to meet the requirements of this section</i> with respect to the specific equipment or service in question.” 2. “The <i>technical and economic</i> impact on the operation of the manufacturer or provider <i>and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies</i>.” 3. “The type of operations of the manufacturer or provider.” 4. “<i>The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.</i>” (Sec. 716(g)) |

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Consumer Electronics Association
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July 18, 2011**

| Subject¹ | H.R. 3101 (as introduced) | Pub. L. 111-260 (as enacted) |
|--|----------------------------------|---|
| Waiver Authority | None | “The Commission shall have the authority . . . to waive the requirements of this section for any feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment, for any provider of advanced communications services, or for any class of such services, that— (A) is capable of accessing an advanced communications service; and (B) is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.” (Sec. 716(h)(1)) |
| Small Business Exemption | None | “The Commission may exempt small entities from the requirements of this section.” (Sec. 716(h)(2)) |
| Customized Equipment or Services Exemption | None | “The provisions of this section shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” (Sec. 716(i)) |
| Rule of Construction | None | “This section shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.” (Sec. 717(j)) |

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| Sections 717, 718 of the Communications Act and Section 106 of CVAA | | |
|--|--|---|
| Remedies | “CEASE AND DESIST ORDERS.—If the Commission’s investigation . . . determines that a manufacturer of equipment or provider of service is engaged in an act prohibited by section 255, 716, 718, or 719, or is failing to perform any act required by section 255, 716, 718, or 719, the Commission shall have the authority to order such manufacturer or provider to cease from violating such section.” | “If the Commission determines that a violation has occurred, the Commission may, in the order issued under this subparagraph or in a subsequent order, direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with requirements of those sections within a reasonable time established by the Commission in its order.” (Sec. 717(a)(3)(B)(i)) |
| Reporting and Recordkeeping | Required all manufacturers and providers to submit an annual report that details the steps taken to achieve compliance. | Replaced annual reporting requirement with a recordkeeping obligation and annual certification that the records are being kept. (Sec. 717(a)(5)(A), (B)) |
| Internet Browsers Built into Telephones Used with Public Mobile Services | None | Added, effective 3 years after enactment (<i>See</i> Sec. 718). |
| Internet Access Service User Interface | “Every provider of Internet access service and every manufacturer of Internet access equipment shall, unless it would result in an undue burden, make user interfaces for such service and equipment accessible to individuals with disabilities, including those interfaces used to initiate, monitor, and control such service.” | None |
| Advisory Committee | “Emergency Access and Real-Time Text Advisory Committee” | “Emergency Access Advisory Committee” CVAA Sec. 106 |